No. 83-311

IN THE

Supreme Court of the United States

October Term, 1983

ABRAHAM STRASSNER,

Petitioner,

v.

SELMA ROTHSTEIN STRASSNER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

SELMA ROTHSTEIN STRASSNER
Respondent Pro Se
200 Central Park South
New York, New York 10019
(212) 246-0524

QUESTION

THE QUESTION PRESENTED TO THIS LEARNED COURT, IS ERROR, IN THAT IT HAS BEEN ESTABLISHED FACTUALLY, THAT THERE WAS NO FRAUD ON THE PART OF THE RESPONDENT HEREIN.

JURISDICTION

THE CONSTITUTIONAL PROVISION INVOLVED:

> "NO PERSON SHALL BE DEPRIVED OF PROPERTY . . . . WITHOUT DUE PROCESS OF LAW."

IS APPLICABLE NOT TO THE PETITIONER HEREIN, BUT TO THE RESPONDENT.

THE PARTIES OWN REALTY. THE RESPONDENT SOUGHT HER MOIETY. THE PETITIONER, LIVING THEREIN, RENT FREE (TENANT'S RENT), HAS FOR YEARS, AND STILL DOES, SEEK TO DEPRIVE THE RESPONDENT OF HER SHARE OF THE JOINTLY OWNED PREMISES.

THERE IS NO DEPRIVATION OF PROPERTY . . . . WITHOUT DUE PROCESS OF LAW . . . ." TO THE PETITIONER HEREIN.

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ABRAHAM STRASSNER,

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V.

SELMA ROTHSTEIN STRASSNER,

RESPONDENT.

ANSWER TO WRIT OF CERTIORARI

NOW, COMES THE RESPONDENT, SELMA ROTHSTEIN STRASSNER, AND SUBMITS HEREIN HER SWORN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES.

The respondent herein, respectfully prays that the application of petitioner to review a Judgment of the Supreme Court, the Appellate Division of the Supreme Court and the Court of Appeals, be denied.

The petitioner improperly invokes a constitutional provision - Amendment V, viz.:

> "No person shall be deprived of property . . . without due process of law . . . ."

It is the petitioner, who is endeavoring to misuse the Fifth Amendment to deprive the respondent, former wife, of her moiety in a former marital residence.

The petitioner attempted to vacate a bilateral foreign divorce (Mexican), by stating he signed a Special Power of Attorney in the office of his attorney, which attorney acknowledged his signature, wherein he consented to appear in the Mexican proceedings

AND IMPOWERED AN ATTORNEY IN MEXICO TO REPRESENT HIM.

THAT A PROCEEDING FOR AN ORDER OF PARTITION AND FOR THE SALE OF PREMISES LOCATED IN BROOKLYN, NEW YORK, WAS INITIATED ON THE GROUND THAT THE PREMISES ARE HELD BY THE PARTIES AS TENANTS IN COMMON, AS A RESULT OF A BILATERAL DIVORCE OBTAINED BY THE RESPONDENT IN THE CIRCUIT COURT OF BRAVOS COUNTY, STATE OF CHIHUAHUA, COUNTRY OF MEXICO.

HISTORY

PETITIONER AND RESPONDENT INTERMARRIED APRIL 6, 1949, AND HAVE TWO CHILDREN, BOTH LONG AGO EMANCIPATED.

THAT ON JANUARY 31, 1970, RESPONDENT INITIATED AN ACTION FOR A SEPARATION IN THE SUPREME COURT, KINGS COUNTY, ON THE GROUND OF CRUEL AND INHUMAN TREATMENT WHICH INCLUDED NUMEROUS ACTS OF ASSAULTS AND BATTERIES.

That the petitioner interposed an answer to respondent's complaint and the petitioner did appear by an attorney whose name appears thereon, thusly:

"Yours etc.

KENNETH L. SHAPIRO
c/o Spector, Meisner, Greenspun,
Berman & Fink
16 Court Street
Brooklyn, New York 11201"

That the pink back cover of the Answer to respondent's complaint, contained the same typed in name, KENNETH L. SHAPIRO over printed Spector, Meisner, Greenspun, Berman & Fink.

That after the matter became at issue, the petitioner continued to implore respondent for a reconciliation.

That in July 1970, the parties met at a place called Market Diner, New York, New York.

That an agreement was reached, thusly:

(1) The respondent would return to the marital premises, but only if she was divorced.

(2) That this would permit her to walk away from the petitioner in the event she was assaulted or abused again.

(3) That the attorneys for the respective parties entered into a stipulation discontinuing the New York separation action. The attorneys being, Burton G. Rudnick, Esq., for respondent, and Kenneth L. Shapiro, Esq., for petitioner.

(4) That the petitioner executed an instrument called a Special Power of Attorney, This power also contained a notice of appearance and consent to appear in the jurisdiction. That the instrument was sworn to and was acknowledged by the above attorney, Kenneth L. Shapiro, Esq., on August 4, 1970.

That the respondent appeared in person and did comply with the rules and regulations of the State of Chihuahua. The respondent obtained a judgment of divorce on the 22nd day

of August, 1970.

That at the divorce proceedings, the petitioner was represented by an attorney of his own selection and choice, one Carlos Munoz.

The respondent returned to Brooklyn, New York, but did not reconcile. The respondent waited for an exemplified copy of the Judgment, duly translated by the American Counsel, to arrive.

That several weeks thereafter, upon receipt of the Mexican Judgment, the respondent returned to the marital premises.

That the respondent left the premises at the end of 1976 or 1977, because of the cruel and inhuman treatment administered by the petitioner.

That the respondent made demand upon the petitioner to sell the jointly owned house, and divide the proceeds, but that the petitioner refused so to do.

THE RESPONDENT SUED TO PARTITION THE PREMISES. THE COURT DETERMINED THAT THE DIVORCE WAS BILATERAL IN NATURE AND THAT THE TENANCY WAS CONVERTED TO TENANCY IN COMMON. THE COURT DIRECTED THAT THE PROPERTY IS PARTITIONED AND SHOULD BE SOLD AND DIVIDED. THIS DECISION AND ORDER HAS BEEN SUSTAINED FROM SUPREME COURT THROUGH THE APPELLATE DIVISION AND COURT OF APPEALS OF NEW YORK STATE.

PETITIONER'S CONTENTION

THE PETITIONER HEREIN SETS FORTH HIS FULL ERRONEOUS CONTENTION:

> "PETITIONER CONTENDS THAT NO KNOWLEDGEABLE CONSENT TO APPEAR IN THE COURTS OF MEXICO WAS EVER PROCURED FROM HIM WHICH WOULD MAKE THE MEXICAN ACTION BILATERAL IN NATURE AND WOULD HAVE SIGNALED HIS ACQUIESCENCE THAT THE DIVORCE MATTER BE LITIGATED IN MEXICO."

There was no actual legal or equitable defense submitted to respondent's New York action by this petitioner. There is no claim by petitioner of intrinsic fraud, duress or other fault. He advanced no defense that could vitiate the bilateral divorce.

On the contrary, it was difficult to ascertain by his testimony and pleadings, if petitioner's claim of fraud was directed to respondent, the Court of Mexico, or his own attorney.

The petitioner admitted in his testimony and pleadings:

(1) That he signed an instrument called a Special Power of Attorney to have Carlos Munoz, appointed his attorney in Mexico.

(2) The petitioner admitted this was signed - the power at the home of his attorney, Kenneth L. Shapiro.

(3) The petitioner admitted that the lawyer was a notary.

(4) That the signature on the Power of Attorney and consent to appear in the Mexican Court, was his. However, he claimed that he did not know what he was signing, that Mr. Shapiro was not his attorney, but Mr. Berman, of the same law firm, was his attorney.

The petitioner acknowledged that he attended three colleges, Fordham, Brooklyn and New York. That he was in the District Attorney's office for 2 years as a rackets investigator; that he was on the executive staff of the Comptroller of the City of New York, and that he signed the instrument to keep respondent.

The following question and answer was given:

Q. . . . . Now, however, with this background of an education and with this background of public service, you went to the

HOME OF A MAN AND YOU SIGNED A PAPER AND YOU DID NOT KNOW WHAT YOU WERE SIGNING, IS THAT WHAT YOU ARE TELLING US?

A. <u>BECAUSE I WANTED MY WIFE</u>.

THAT THE PETITIONER ULTIMATELY STIPULATED THAT IF MR. SHAPIRO WAS TO TESTIFY, HE WOULD STATE HE WAS AN ATTORNEY AND THAT HE DID TAKE THE SIGNATURE OF THE PETITIONER ON AUGUST 4, 1970.

THUS, HAVING PRESENTED ALL THE ABOVE TO THE COURT, IT WAS FOUND THAT RESPONDENT WAS DIVORCED.

THAT A PARTITION AND SALE WAS ORDERED AND A DIRECTION THAT EACH RECEIVE A ONE-HALF SHARE.

AN APPRAISER WAS APPOINTED.

THAT RESPONDENT SHALL PROCEED FURTHER, REQUEST THAT THE HOUSE BE SOLD AND THE NET PROCEEDS DIVIDED.

THE PETITIONER IS RESIDING RENT FREE, BECAUSE HE HAS A TENANT PAYING PRACTICALLY ALL RENT - UTILITIES.

THE PETITIONER DOES NOT WANT TO LOSE HIS FREE RENT, SO INVOKES THE FIFTH AMENDMENT HEREIN.

HE USES SAME AS A CLUB ON RESPONDENT TO DETER THE PROPER CONCLUSION.

RESPONDENT REQUESTS THE PETITION BE DISMISSED.

DATED: OCTOBER 4, 1983

RESPECTFULLY SUBMITTED,

SELMA ROTHSTEIN STRASSNER
RESPONDENT-PRO-SE
200 CENTRAL PARK SOUTH
NEW YORK, NEW YORK
TELEPHONE: (212) 246-0524

STATE OF NEW YORK)
COUNTY OF KINGS) SS:

ON THE 4TH DAY OF OCTOBER, 1983, BEFORE ME PERSONALLY CAME, SELMA ROTHSTEIN STRASSNER, TO ME KNOWN, AND KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED IN, AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND DULY ACKNOWLEDGED TO ME THAT SHE EXECUTED THE SAME.

HELEN M. SARUBBI
Notary Public, State of New York
No. 24-4766666
Qualified in Kings County
Commission Expires March 30, 1984

APPENDIX

POINT I

BURDEN OF PROOF

THE PETITIONER QUOTES BURDEN OF PROOF AND ATTEMPTS TO PLACE THE ONUS ON RESPONDENT, WHEN IT IS HE WHO USES SAME AS A SWORD.

NEW YORK JURISPRUDENCE VOL. 14, PAGE 274:

> ONE WHO ALLEGES FRAUD AS A BASIS OF A DEFENSE MUST ESTABLISH IT BY THE REQUISITE QUANTUM OF PROOF IN ORDER TO PREVAIL IN THE ACTION. SINCE IN THE ABSENCE OF PARTICULAR CIRCUMSTANCES, THE PRESUMPTION IS IN FAVOR OF GOOD FAITH, INNOCENCE AND HONESTY AND AGAINST FRAUD, THE PARTY, WHO ALLEGES FRAUD ORDINARILY MUST CARRY THE BURDEN OF PRODUCING EVIDENCE TO PROVE IT.
>
> FRAUD IS A FACT THE EXISTANCE OF WHICH IS ASCERTAINED LIKE OTHER FACTS BY COM-

PARING AND WEIGHING THE EVIDENCE (BENNETT'S EST. 205 NYS 2D 50). IT IS FUNDAMENTAL THAT IN THE ABSENCE OF SPECIAL CIRCUMSTANCES FRAUD WILL NOT BE PRESUMED, ASSUMED OR INFERRED BUT MUST BE PROVED BY THE PARTY ALLEGING IT AND WHERE A JUDGMENT IS BASED UPON A FINDING OF FRAUD, THERE MUST BE EVIDENCE OF FRAUD WHICH JUSTIFIES THE FINDINGS IN ORDER TO SUSTAIN THE JUDGMENT (WAGGONER V. JAGEACH 241 AD 324, 272 NYS 182, BARR V. SOFRAUSKI, 130 AD 783, 115 NYS 533). WHERE THE EVIDENCE RELIED UPON TO PROVE FRAUD IS EQUALLY CONSISTENT WITH INNOCENCE THAT CONSTRUCTION MUST BE PLACED UPON IT, WHICH WILL EXONERATE THE PARTY ACCUSED, 3 CAINES 182. THUS, IF THERE IS PROOF OF AN HONEST INTENT THE PROOF OF FRAUD IS WANTING. SPUR V. HALL, 46 AD 451, 61 NYS 854 AFF 279 NY 634.

AS TO POINT I

THE PETITIONER CONTENDS THAT THE BURDEN OF PROOF AS TO THE VALIDITY OF THE INSTRUMENT IN EVIDENCE PURPORTING TO BE A POWER OF ATTORNEY AND CONSENT IN A MEXICAN DIVORCE, IS ON THE RESPONDENT HEREIN.

THE PETITIONER SUBMITS THE CITATION KANTROWITZ V. KANTROWITZ, 21 AD 2D 654, 249 NYS 2D 723.

IT IS THE ARGUMENT HEREIN, THAT THE PETITIONER HAS A MISCONCEPTION OF THE NATURE OF HIS CITATION.

IT IS THE PETITIONER WHO WISHES THIS INSTRUMENT, CONSENT (POWER OF ATTORNEY) TO BE USED TO HIS ADVANTAGE. THE PETITIONER'S EFFORT IS AN ATTEMPT TO DENY THAT THE PARTIES ARE DIVORCED. THE PETITIONER ATTEMPTS TO AVOID PARTITION AND SALE, SO THAT HE MAY BENEFIT IN THE TENANT'S RENT AND WHICH SHALL GIVE HIM FREE RENTAL. HE ALSO TRIES TO VOID RESPONDENT'S MOIETY THEREIN.

Petitioner admits signing the Power of Attorney used in the divorce action in Mexico.

The petitioner stipulated that the party who acknowledged his signature, was a lawyer.

The petitioner stipulated he knew the notary ten years before he signed the Power and Consent.

The petitioner said he signed said Power and Consent because HE WANTED HIS WIFE, and he signed said instrument after a meeting with her at a restaurant.

Although he stated he knew not what he signed, his credibility was overtaxed, in that besides having an education up to college level, he was an investigator for the Rackets Bureau of the District Attorney's office for 2 years, and an executive in the Comptroller's office for five years, together with being a salesman for 5 years.

ON THE SURFACE, THIS TYPE OF EDUCATION AND EMPLOYMENT WOULD DENY IGNORANCE, NEGLIGENCE, FRAUD, DURESS OR MISTRUST.

THE BURDEN OF PROOF IS ON THE PETITIONER IN ANY EVENT. HE HAS NOT SUSTAINED SAME.

AS TO POINT II

SUDDENLY HEREIN, THIS PETITIONER REVERTS TO THE DEFENSE OF FRAUD.

THE DIVORCE HEREIN WAS BI-LATERAL.

THE DEFENSE PROMULGATED BY THE PETITIONER THAT HE KNEW OF NO DIVORCE AND/OR PRIOR CONVERSATIONS WITH RESPECT THERETO, IS NOT CREDIBLE. (SEE HIS ADMISSIONS SUPRA).

HE ADMITS SIGNING THE POWER OF ATTORNEY, BEFORE A LAWYER NOTARY, WHICH LAWYER REPRESENTED HIM IN THE NEW YORK MATRIMONIAL ACTION, AND WHO, AS HIS LAWYER, SIGNED THE STIPULATION OF DISCONTINUANCE. HOWEVER, WHEN PRESSED, HE

ADMITTED HE SIGNED A PAPER BECAUSE HE WANTED HIS WIFE.

THERE IS NO DEFENSE IN THE INSTANT CAUSE. THE MEXICAN DIVORCE IS VALID. THIS PETITIONER CONSENTED TO THE DIVORCE AND EMPOWERED RESPONDENT TO OBTAIN THIS BI-LATERAL DECREE.

THAT THIS SITUATION IS FACTUAL IN NATURE. THERE WAS NO FRAUD.

IN HUNT V. HALL, 72 NY 217 AFF. 139 AD 120, 123 NYS 1056, THE COURT STATED:

> "FRAUD MUST BE ACTIONABLE AND THE ELEMENTS OF ACTUAL FRAUD SUCH AS FALSE REPRESENTATION WHICH WAS DESIGNED TO MISLEAD THE OPPOSITE PARTY, SCIENTER RELIANCE UPON THE MISREPRESENTATION AND RESULTANT DAMAGE TO THE DEFRAUDED PARTY MUST ALL APPEAR."

THE PETITIONER WAS REPRESENTED BY COUNSEL AND SHOULD NOT NOW BE PERMITTED TO PLEAD IGNORANCE, FRAUD OR DURESS. CHRISTIAN V.

CHRISTIAN, 42 NY 2D 63, 396 NYS 2D 817.

AS TO POINTS III AND IV

THE MARRIAGE MAY NOT BE RESURRECTED BY THE ACTIONS OF THE PARTIES AFTER A DIVORCE. THERE MUST BE A REMARRIAGE TO SUBSTANTIATE SUCH AN ARGUMENT.

THERE TOO, IS NO CORROBORATION OF PETITIONER'S CLAIM THAT HE WAS NOT REPRESENTED BY COUNSEL, DID NOT KNOW WHAT HE SIGNED, BECAUSE OF POST DIVORCE ACTIVITIES.

AS TO POINT V

DOCTRINE OF COMITY

THE PETITIONER HEREIN, MAKES A DESTINCTION BETWEEN FULL FAITH AND CREDIT OF A SISTER STATE'S JUDGMENTS AND COMITY WITH RESPECT TO FOREIGN JUDGMENTS.

THE CITATIONS OF CALDWELL V. CALDWELL, 298 NY 146, DOES NOT PROVE HIS POINT. THE COURT STATED THAT NOTHING DETERS THE RECOGNITION OF FOREIGN DECREES AND THAT FULL FAITH

AND CREDIT AND COMITY HAVE NO RELATIONSHIP TO THE OTHER.

THE PETITIONER WAS REPRESENTED BY NEW YORK COUNSEL, WHO OBTAINED MEXICAN COUNSEL TO REPRESENT PETITIONER IN THE THIRD DISTRICT COURT, BRAVOS COUNTY, CHIHUAHUA, MEXICO.

THE PETITIONER DID SIGN A SPECIAL POWER OF ATTORNEY AT HIS ATTORNEY'S HOME, WHICH SIGNATURE WAS ACKNOWLEDGED BY HIS ATTORNEY, A NOTARY.

THAT AN APPEARANCE WAS MADE FOR HIM BY HIS DESIGNEE, A MEXICAN ATTORNEY, ONE CARLOS URANGO MUNOZ.

THAT THE POWER, CONSENT AND WAIVER, WAS ADMITTEDLY SENT TO THIS ATTORNEY IN MEXICO, MR. MUNOZ, BY PETITIONER'S ATTORNEY.

THAT THE RESPONDENT ATTENDED THE HEARING AT THE DISTRICT COURT, DID COMPLY WITH THE RULES AND JURISDICTIONAL REGULATIONS OF SAID STATE OF CHIHUAHUA.

It is axiomatic that a bi-lateral Mexican divorce is recognized in the State of New York.

In Greschler v. Greschler, 51 NY 2d 308, 434 NYS 2d 194, the Court of Appeals stated:

> "(3,4) Although not required to do so, the courts of this State generally will accord recognition to the judgments rendered in a foreign country under the doctrine of comity which is the equivalent of full faith and credit given by the courts to judgments of our sister States. (See e.g., Schoenbrod v. Siegler, 20 N.Y. 2d 403, 408, 283 N.Y.S. 2d 881, 230 N.E. 2d 638; see, generally, Restatement, Conflict of Laws 2d, § 98; Leflar, American Conflicts Law (3d ed.), § 84, pp. 169-171). Absent some

SHOWING OF FRAUD IN THE PROCUREMENT OF THE FOREIGN COUNTRY JUDGMENT (FEINBERG V. FEINBERG, 40 N.Y. 2D 124, 386 N.Y.S. 2D 77, 351 N.E. 2D 725) OR THAT RECOGNITION OF THE JUDGMENT WOULD DO VIOLENCE TO SOME STRONG PUBLIC POLICY OF THIS STATE (SEE, E.G. MERTZ V. MERTZ, 271 N.Y. 466, 3 N.E. 2D 597), A PARTY WHO PROPERLY APPEARED IN THE ACTION IS PRECLUDED FROM ATTACKING THE VALIDITY OF THE FOREIGN COUNTRY JUDGMENT IN A COLLATERAL PROCEEDING BROUGHT IN THE COURTS OF THIS STATE.

IN EXTENDING COMITY TO UPHOLD THE VALIDITY OF FOREIGN COUNTRY DIVORCE DECREES (ROSENSTIEL V. ROSENSTIEL, 16 N.Y. 2D 64, 262 N.Y.S. 2D 86, 209 N.E. 2D 709), IT IS LOGICAL THAT WE WOULD ALSO RECOGNIZE ALL THE PROVISIONS OF

SUCH DECREES, INCLUDING ANY SEPARATION AGREEMENTS WHICH MAY HAVE BEEN INCORPORATED THEREIN. (SEE LAPPERT V. LAPPERT, 20 N.Y. 2D 364, 283 N.Y.S. 2D 26, 229 N.E. 2D 599). IN FACT, WE HAVE STATED THAT A FOREIGN DIVORCE DECREE RENDERED BY A COURT WITH PERSONAM JURISDICTION OVER BOTH SPOUSES HAS AN "OVERRIDING EFFECT" ON ANY SUBSEQUENT ACTION SEEKING ALIMONY SUCH THAT "NO RIGHT OF SUPPORT CAN SURVIVE EXCEPT AS AWARDED BY THE FINAL DECREE OF DIVORCE OR BY AN AUTHORIZED AMENDMENT TO SUCH DECREE." (LYNN V. LYNN, 302 N.Y. 193, 203-204, 97 N.E. 2D 748; LAPPERT V. LAPPERT, 20 N.Y. 2D 364, 367, 283 N.Y.S. 2D 26, 229 N.E. 2D 599, SUPRA.)"

AS TO POINT VI

TENANCY IN COMMON

It is the position of the respondent that there is no longer a tenancy in the entirety. That the bi-lateral Mexican decree terminated the marriage and that the parties are tenants in common. That as such, the court may partition and direct a sale of the premises.

POINT I - IN REPLY

The respondent herein submits that the petitioner did not call a witness, whose testimony was available.

The petitioner did not care so to do.

The attorney, Kenneth L. Shapiro, is listed as an attorney in two telephone books - Manhattan directory, p. 1256, first column - Kenneth L. Shapiro atty 275 Madison Avenue - 582-7700.

The attorney, Kenneth L. Shapiro, is also listed in the Brooklyn telephone book, p. 861 - Kenneth L. Shapiro atty
275 Madison Avenue, Manh.
582-7700.

Thus, the startling statement of the petitioner that Kenneth L. Shapiro, was not known to him as an attorney, and that he signed the consent at Kenneth L. Shapiro's home, not knowing the contents, but at the behest of his attorney, Herbert Berman, Esq., leaves much to be desired with respect to petitioner's credibility.

The incredulity of petitioner's statement is more apparent when one looks at the filed papers, viz., that Kenneth L. Shapiro, Esq., appeared as petitioner's attorney in the Supreme Court Kings action; that his name appeared on the back of said answer; that he signed a stipulation of discontinuance as the

PETITIONER'S ATTORNEY, AND VERIFIED THE PETITIONER'S SPECIAL POWER OF ATTORNEY TO ONE, CARLOS URANGO MUNOZ, A MEXICAN ATTORNEY.

HOWEVER, THE RESPONDENT RECEIVED THE POWER ADMITTEDLY SIGNED BY THE PETITIONER, THE SIGNATURE THEREON VERIFIED BY AN ATTORNEY-AT-LAW, KENNETH L. SHAPIRO, SUPRA, EXPENDED HER FUNDS TO ENPLANE TO MEXICO, HAVING RETAINED AND PAID FOR A MEXICAN ATTORNEY, PAID HOTEL BILLS, STAYED IN MEXICO IN CONFORMITY WITH THE REQUISITE PERIOD PROSCRIBED BY SAID COURT'S STATUTES, RETURNED AND KEPT HER PART OF THE BARGAIN.

THE INSTRUMENTS AND INSTRUMENT ARE IN EVIDENCE.

YET, THE PETITIONER MADE NO ATTEMPT TO CALL OR SUBPOENA HIS FORMER ATTORNEY TO CORROBORATE HIS DEFENSE, OF FRAUD.

It is requested that this court give no weight to this petitioner's testimony and that the respondent's evidence already in the case, be construed strongly in her favor.

It is respectfully submitted, that the legal issue with respect to petitioner's failure to produce a witness or evidence in the possession or control of a party, was set forth in Jarret v. Madifari, 67 AD 2d 396, 415 NYS 2d 644:

> "The rule with respect to the drawing of an unfavorable inference from the failure to call a witness applies only to a person whom the party would naturally be expected to call . . . ."
>
> . . . . As noted in Reehil v. Fraas, 129 App. Div. 563, 565, 114 NYS 17, 18 (2nd Dept. 1908,

REV. ON OTHER GROUNDS, 197 N.Y. 54, 90 N.E. 340 (1909):

> '(THE) RULE IN RESPECT OF A FAILURE OF A PARTY TO PRODUCE ORAL EVIDENCE IS THAT SUCH FAILURE IS A FACT TO BE CONSIDERED IN DETERMINING HOW MUCH WEIGHT, IF ANY, SHOULD BE GIVEN TO THE EVIDENCE WHICH HE HAS PRODUCED . . . THE QUESTION IS ONE OF INFERENCE FOR THE JURY - OR FOR THE TRIAL JUDGE, IF THERE BE NO JURY; I.E. IT IS NOT AN INFERENCE OR PRESUMPTION OF LAW, BUT ONE OF FACT . . .'

HOWEVER, THE PETITIONER DID STIPULATE THAT THE SAID KENNETH L. SHAPIRO IS AN ATTORNEY; THAT THE POWER OF ATTORNEY WAS EXECUTED IN HIS PRESENCE AND THAT HE ACKNOWLEDGED SAME.

CERTAINLY, IF THE PETITIONER WISHED MORE, HE COULD HAVE CALLED HIM.

THE PETITIONER SHOULD HAVE CALLED HIS OWN ATTORNEY. THE ATTORNEY COULD INTERPOSE THE QUASH OF PRIVILEGE IF RESPONDENT CALLED HIM.

POINT II

THE ACTIONS OF THE PARTIES AFTER THE DIVORCE ARE NOT PERSUASIVE BUT ARE SUBJECT TO LOWER COURT'S INTERPRETATION

THE PETITIONER HAS TESTIFIED THAT THE RESPONDENT COHABITED WITH HIM AFTER THE DIVORCE, ATTENDED A 25TH WEDDING ANNIVERSARY AND THAT SHE USED HIS MEDICAL PLAN. THE PETITIONER CONTENDS THAT AS A RESULT OF THESE POST DIVORCE FACTORS, RESPONDENT'S COMPLAINT SHOULD BE DISMISSED.

IN BOXER V. BOXER, 12 MISC. 2D 205, 207, 177 NYS 2D 85; AFFIRMED 7 AD 2D 1001, 184 NYS

2d 303, (2nd Dept.) affirmed 7 NY 2d 781, 194 NYS 2d 47, seemingly is on all fours with the facts in the instant cause.

The wife sued for a declaratory judgment.

Therein, the husband was the recepient of a power of attorney and consent in an Alabama divorce.

He testified he left New York on Friday, attended court Saturday, returned Sunday. Thereafter, he continued to see his ex-wife, admitted having relations with her.

They appeared at weddings and social functions. He acquiesced in their being introduced as husband and wife. In due course, a child was born, which he refused to recognize because he relied on the validity of the divorce.

The court found the wife was not fraudulently induced to appear in the Alabama action. She executed and acknowledged the power of attorney,

FULLY AWARE OF THE CONTENT AND PURPOSE . . .

SHE WAS 28 YEARS OF AGE, A HIGH SCHOOL GRADUATE WITH BUSINESS EXPERIENCE OF SOME FOUR YEARS AS SECRETARY TO A BUYER IN WHICH POSITION SHE HANDLED CORRESPONDENCE AND ORDERS.

THE COURT IS OF THE OPINION THAT SHE WAS SUFFICIENTLY INTELLIGENT TO UNDERSTAND THE NATURE OF THE DOCUMENT WHICH SHE READ AND ACKNOWLEDGED BEFORE A NOTARY . . . .

ON PAGE 88, THE COURT STATED:

> "HAVING THUS VOLUNTARILY EXECUTED A POWER AUTHORIZING AN ATTORNEY IN ALABAMA TO APPEAR FOR HER (HIM) IN A CONTEMPLATED DIVORCE ACTION TO ADMIT ON HER BEHALF THE JURISDICTIONAL ALLEGATIONS OF THE COMPLAINT PLAINTIFF IS ESTOPPED FROM CHALLANGING THE RESULTANT DECREE . . ."

In the instant cause, there is greater weight to respondent's case, in that the petitioner was represented by counsel; that he signed the papers in his attorney's presence; that his attorney took his signature and delivered same to his Mexican attorney.

The petitioner also informed this court that the was a high school graduate and had attended three colleges.

The petitioner testified that he was an executive in the office of the District Attorney - Kings County, investigator Rackets Bureau 1968-1970, and had been an executive in the office of the Comptroller of the City of New York 1970-1975, and that he had been a salesman for years.

The court could take arithmatical and judicial notice that he had been married approximately 21 years (1970-1949) and was in his matured 40's at the time he executed the power.

IT IS RESPECTFULLY SUBMITTED THAT HE HAD SUFFICIENT COMPREHENSION, AND INTELLIGENCE TO UNDERSTAND THE NATURE OF THE DOCUMENT HE SIGNED, ESPECIALLY WITH THE ASSISTANCE OF COUNSEL. (CHRISTIAN V. CHRISTIAN, 42 NY 2D 63, 396 NYS 2D 817).

CONCLUSION

THE APPLICATION HEREIN FOR A WRIT OF CERTORARI SHOULD BE DENIED.

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